No. 84-1560

(7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PRESS-ENTERPRISE COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY,

Respondent.

On Writ of Certiorari to The Supreme Court of California

BRIEF *AMICI CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; AMERICAN BROADCASTING COMPANIES, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CBS INC.; CHICAGO TRIBUNE COMPANY; CHRONICLE PUBLISHING CO.; THE CONCORD MONITOR; DOW JONES & CO., INC.; GANNETT CO., INC.; GLOBE NEWSPAPER COMPANY; THE HEARST CORPORATION; THE MIAMI HERALD PUBLISHING CO.; MINNEAPOLIS STAR AND TRIBUNE COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL NEWSPAPER ASSOCIATION; NATIONAL PUBLIC RADIO; THE PHILADELPHIA INQUIRER; PHOENIX NEWSPAPERS, INC.; PUBLIC BROADCASTING SERVICE; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; RICHMOND NEWSPAPERS, INC.; SCRIPPS HOWARD; SEATTLE TIMES COMPANY; AND THE WASHINGTON POST.

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Brief *Amici Curiae* of American Newspaper Publishers Association; The Society of Professional Journalists, Sigma Delta Chi; American Broadcasting Companies, Inc.; American Society of Newspaper Editors; CBS Inc.; Chicago Tribune Company; Chronicle Publishing Co.; The Concord Monitor; Dow Jones & Co., Inc.; Gannett Co., Inc.; Globe Newspaper Company; The Hearst Corporation; The Miami Herald Publishing Co.; Minneapolis Star and Tribune Company; National Association of Broadcasters; National Newspaper Association; National Public Radio; The Philadelphia Inquirer; Phoenix Newspapers, Inc.; Public Broadcasting Service; Radio-Television News Directors Association; Reporters Committee for Freedom of the Press; Richmond Newspapers, Inc.; Scripps Howard; Seattle Times Company; and The Washington Post.

INTEREST OF THE AMICI CURIAE

In this second case involving the *Riverside Press-Enterprise* to come before this Court in the last three terms, the California courts have ruled that a trial judge properly conducted more than forty days of pretrial hearings in a multiple-murder prosecution behind closed doors. *Amici curiae* and their members are publishers, broadcasters, editors, reporters and photographers working throughout the United States. *See* Appendix *infra*. *Amici* are keenly aware that instead of acquiring information about criminal proceedings "by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (Burger, C.J. announcing judgment). Thus, *amici* and their members possess a deep and abiding interest in ensuring that the public's right of access to judicial proceedings in criminal cases, a right guaranteed by the First Amendment, is not compromised, as it has been in this case.

SUMMARY OF ARGUMENT

Three times since 1980, this Court has held that the First Amendment affords the press and public a right of access to judicial proceedings in criminal cases. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The right of access emanates both from our tradition of open judicial proceedings in criminal cases and from the vital role of public proceedings in maintaining the integrity of the judicial process and our system of self-government. *Id.* at 569.

The decision of the trial court in this case to close every minute of a forty-one day preliminary hearing in a capital case and seal the transcript of that secret proceeding violates the First Amendment. Throughout Anglo-American history, when criminal proceedings have matured from the investigative or inquisitorial stage to become part of the judicial process, they have consistently been conducted in public. From the open-air meetings of pre-Norman England through the

preliminary hearing presided over by Chief Justice Marshall during the prosecution of Aaron Burr for treason, our heritage bespeaks an unbroken tradition of open judicial proceedings in criminal cases.

Indeed, whether a judicial officer is called upon to render an adjudication during the course of a criminal trial or in any of a myriad of pretrial settings, public access to those proceedings serves an imposing array of structural values. Open proceedings provide a fundamental safeguard that restrains the abuse of power by public officials, checks corrupt practices, and protects the rights of the accused. Moreover, public access ensures the citizenry a free flow of information about the criminal justice system and facilitates informed debate about public affairs. In contemporary America, the criminal justice process has become, for all practical purposes, a pretrial process. In an era when more than ninety percent of criminal cases are disposed of prior to trial, the public must have access to pretrial proceedings, or else it will lose confidence in the system of dispensing criminal justice itself. To deny the press and public access to those judicial proceedings in which the fate of the accused is typically determined will serve only to diminish the reservoir of public confidence enjoyed by the judiciary for more than two centuries.

Accordingly, *amici* urge this Court to hold that closure of *any* judicial proceeding in a criminal case is constitutionally impermissible unless, following a hearing and findings articulated in the record, the trial court finds that (1) open proceedings would create a clear and present danger to the fairness of the trial; (2) no less restrictive alternatives to closure are available; and (3) closure will effectively protect the accused's right to a fair trial. If such a standard is properly applied, closure should rarely, if ever, become necessary, especially since pretrial publicity, even intense publicity, poses a realistic threat to a fair trial in only the most extraordinary circumstances. In the instant case, the trial court, as well as the California appellate courts, erroneously presumed that publicity, in and of itself, is an evil to be avoided, and consequently ordered closure of a preliminary hearing without making the requisite findings.

That order is constitutionally impermissible and must be reversed.

ARGUMENT

I. THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS IN CRIMINAL CASES.

A. The First Amendment Grants The Press And Public A Right Of Access To Criminal Proceedings.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court declared for the first time that the First Amendment guarantees both the press and public a right of access to judicial proceedings in criminal cases. This self-proclaimed "watershed" ruling, *id.* at 582 (Stevens, J., concurring), stands for the ineluctable proposition that the courtroom "is a public place where the people generally — and representatives of the media — have a right to be present." *Id.* at 578 (Burger, C.J., announcing judgment).

In the instant case, the trial court's order closing a preliminary hearing and prohibiting release of the hearing transcript violates the First Amendment right of access to judicial proceedings. By summarily closing the courtroom, the trial court failed to recognize that the twin principles underlying this Court's previous decisions defining the right to attend criminal proceedings apply with equal force to the preliminary hearing and other adjudicatory pretrial proceedings: (1) judicial proceedings — whether trial or pretrial — "historically [have] been open to the press and general public," and (2) access to such proceedings "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982).

B. Judicial Proceedings In Criminal Cases Have Traditionally Been Conducted In Open Court.

From *Richmond Newspapers* through *Press-Enterprise I*, this Court has looked to the judgment of history for assistance in ascertaining the scope of the First Amendment right of

access to the criminal justice process. Indeed, the Court has repeatedly asserted that the right of access to judicial proceedings draws its essence from its common law heritage, not only "'because the Constitution carries the gloss of history,'" but, more particularly, because the "'tradition of accessibility implies the favorable judgment of experience.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 603 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)).[1] Thus, in *Richmond Newspapers* itself, the Court reviewed the historical record, dating from the adoption of the First Amendment and earlier, and concluded that public access "has long been recognized as an indispensable attribute of an Anglo-American trial." 448 U.S. at 569 (Burger, C.J., announcing judgment). Similarly, in *Press-Enterprise I*, Chief Justice Burger, writing for the Court,[2] recognized that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process." 464 U.S. at 505.

The lessons of history reveal that, beyond the criminal trial and *voir dire*, the presumption of public access has long been an "indispensable attribute" of virtually all *judicial* proceedings

[1]The relevance of history in ascertaining the scope of the *First Amendment* right of access to criminal proceedings is, therefore, markedly different from the historical analysis undertaken in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), in order to determine whether the *Sixth Amendment* affords third parties, in addition to the accused, the right to a "public trial." In the First Amendment context, this Court has looked to history as a means of discerning a "'tradition of accessibility,'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)), which, in turn, bespeaks a "presumption of openness," 448 U.S. at 573 (Burger, C. J., announcing judgment). The historical inquiry in *Gannett*, however, was designed to discern the intent of the Framers of the Sixth Amendment with respect to the quite different issue of whether they viewed that provision as granting substantive rights to the public, as well as to the accused. *See* 443 U.S. at 385.

[2]Eight justices joined in the Chief Justice's opinion. Justice Marshall concurred in the result. *See* 464 U.S. at 520 (Marshall, J., concurring in result).

in which the accused or his counsel appears before a "neutral and detached" judicial officer. *See Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). Throughout Anglo-American history, while certain inquisitorial functions of police and prosecutors have traditionally been performed in secret, judicial proceedings have consistently been conducted in public. For centuries, the only portion of the criminal justice process characterized by the presence of an impartial, judicial decisionmaker was the trial itself. As recognized in *Richmond Newspapers* and *Press-Enterprise I*, these trials were also characterized by a tradition of public access. *See* 448 U.S. at 564-67; 464 U.S. at 505. From the "open-air meetings" of pre-Norman England, F. Pollock, The Expansion of the Common Law 140 (1904), to the "embarrassingly large and unwieldy" public trials of the twelfth through fourteenth centuries, Wells, *The Origin of the Petty Jury*, 27 L.Q. Rev. 347, 356 (1911), "court day" was "one of the great rivals of the fair or pageant in the attracting of crowds," E. Jenks, The Book of English Law 25 (6th ed. 1967). Even after the jury itself gradually mutated from a body of witnesses to an impartial trier of facts, the entire proceeding was, "[b]y immemorial usage," held "in open court, to which spectators were admitted." 2 J. Bishop, New Criminal Procedure § 957 (2d ed. 1913).

Over time, the criminal justice process at common law came to include components other than the trial itself, components designed primarily to enable the Crown to undertake investigations of criminal conduct. In the sixteenth century, for example, Parliament enacted the Statutes of Philip and Mary, which created the office of magistrate. *See* 1 & 2 Phil. & M., ch. 13. Prior to the passage of the Statutes in 1554 and 1555, criminal indictments were regarded as simply commencing "a piece of litigation between the crown and the accused," and proceedings were the same as in a civil action. 5 W. Holdsworth, A History of English Law 176 (2d ed. 1937).[3] The

[3]*Accord* 2 F. Pollock & F. Maitland, The History of English Law 582-83 (2d ed. 1899). Under the thirteenth century law of arrest, felons were summarily arrested and jailed. "[A]ny preliminary magisterial investigation, such as that which is now-a-days conducted by our justices of the peace, is still in the remote future." *Id.*

Statutes, however, dramatically transformed the criminal law by empowering the magistrate, who served as a combination police officer and public prosecutor, to investigate crimes and bring formal charges against the accused on behalf of the Crown.[4] The magistrate was authorized to undertake interrogations of suspects and witnesses in order to determine whether to commence a criminal prosecution. *See* 1 & 2 Phil. & M., ch. 13, § 4; 2 & 3 Phil. & M., ch. 10, § 2. Although these investigations were often referred to as "preliminary hearings" in their day, they were decidedly inquisitorial proceedings and formed no part of the *judicial* process, which continued to commence with the trial itself. Not surprisingly, in addition to the absence of a judicial officer, proceedings before the magistrate lacked all other trappings of a judicial hearing as well; not only was the magistrate an agent of the Crown, but the accused had no right to counsel, and was not permitted to call or cross-examine witnesses. *See* 5 W. Holdsworth, *supra*, at 192.[5]

The investigatory and inquisitorial function of the magistrate is vividly illustrated in *The Trial of Colonel Turner*, 6 Har. St. Tr. 565 (O.B. 1664). The case involved a robbery and the magistrate was the first witness called at trial. He testified that

[4]Enactment of the Statutes of Philip and Mary was precipitated by the lawlessness of the fifteenth century. In most respects, the Statutes reflect the influence of the law of the Continent, which employed the inquisitorial proceeding as a means of repressing crime. *See* 5 W. Holdsworth, A History of English Law 169-77 (2d ed. 1937). The salient features of the Continental procedure were "secrecy, torture, and restricted opportunities of defense." *Id.* at 174.

[5]Since these so-called "preliminary hearings" in England can in no sense be characterized as judicial proceedings, the fact that "[u]nder English common law, the public had no right to attend" them, *Gannett Co. v. DePasquale*, 443 U.S. at 389; *see id.* at 394-95 (Burger, C.J., concurring), is of little, if any, relevance to the tradition of public access to judicial proceedings. Indeed, to the extent that most modern pretrial proceedings, which were largely unknown at common law, can be compared to the English experience, the appropriate analogy is to the criminal trial itself. For example, "the modern suppression hearing . . . is a type of objection to evidence such as took place at common law, and as takes place today in the case of non-constitutional objections, in *open court* during trial." *Id.* at 437 (Blackmun, J., concurring in part) (emphasis in original).

he was called to the scene of the crime, where the victim "put me upon the business to examine it." *Id.* at 572. The magistrate then interrogated the victim's two servants and proceeded to the home of the suspect, Colonel Turner:

> I called him in, but he denied it; but not as a person of his spirit, which gave me some cause of further suspicion. I desired to search his house; nay, told him I would whether he would or no.

Id. The next day, after receiving a tip from an informant, the magistrate apprehended Colonel Turner, elicited a confession, and sent him to jail. *Id.* at 573-76. Such investigative activity was commonplace for magistrates in the seventeenth century — they served, for all practical purposes, as the precursor of the modern day policeman.[6]

Since the function of the magistrate at common law was to gather evidence and, ultimately, bring formal charges against the accused, he conducted his investigations in secret.[7] In this manner, the accused was denied access to the evidence against him, which was communicated by the magistrate only to his colleague, the prosecutor. *See* 5 W. Holdsworth, *supra*, at 191. In short, the secrecy inherent in these so-called "preliminary hearings" was designed to keep the accused ignorant of the prosecution's case *prior to* the commencement of the judicial process. By excluding the public as well as the prisoner from these inquisitorial proceedings, the risk that details of the Crown's case would be leaked to the accused was minimized.

[6]*See, e.g.*, *The Trial of Count Coningsmark*, 9 Har. St. Tr. 1 (O.B. 1682) (magistrate searched several houses for murder suspects and upon their arrest took them to his home for examination); *The Trial of George Busby*, 8 Har. St. Tr. 525 (Assizes 1681) (magistrate broke down doors of house and conducted search throughout the night until suspect, a "Romish Priest," was found).

[7]*See* 1 J. Stephen, A History of the Criminal Law of England 225 (1883) ("I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial.").

Once the magistrate determined to bring charges, however, the accused was bound over for a *public* trial before an impartial judge and jury. *See* T. Smith, De Republica Anglorum 85-98 (1583) (Alston ed. 1806).

Prior to the American Revolution, the administration of justice in the colonies generally followed the prescriptions of the Statutes of Philip and Mary.[8] Even after the war for independence, some courts continued to conduct inquisitorial proceedings based on the English model.[9] Yet, soon after the promulgation of the Bill of Rights, preliminary hearings in the United States acquired judicial characteristics. In fact, the Fifth Amendment privilege against self-incrimination itself provided the impetus for the abolition of magisterial interrogation. *See* Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1236 (1932). In its place, the new nation developed a bifurcated system of law enforcement in which the inquisitorial and judicial functions became more clearly distinct and independent than they had been in England. The magistrate's inquisitorial and prosecutorial powers were usurped at an early stage by "the county prosecutor as an aggressive agent of law enforcement, and [by] the power and prestige of the sheriff in all frontier communities." R. Moley, Our Criminal Courts 20 (1930). Conversely, even before the development of the modern police force, "[t]he idea of separation of powers, so much insisted on in the American polity, made [pretrial proceedings] *judicial*, with all the constitutional safeguards attaching to a judicial proceeding." R. Pound, Criminal Justice in America 88 (1930) (emphasis added). In short, the magistrate became a judge, who was called upon to render, in the pretrial setting, a detached and independent judgment in matters brought before him. Significantly, as the magistrate evolved into a judicial officer who presided at proceedings held prior to the trial itself,

[8]*See, e.g.*, J. Goebel & T. Naughton, Law Enforcement in Colonial New York: A Study in Criminal Procedure 1664-1776, at 340-41 (1944).

[9]*See, e.g., United States v. White*, 28 F. Cas. 588 (C.C.D. Pa. 1807) (No. 16,685).

those proceedings became decidedly "public affair[s]" in most American jurisdictions. Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. L. Rev. 397, 407 (1961). Indeed, in the few American jurisdictions in which the court retained authority to close pretrial proceedings to the public, it is clear that the power remained "in judicial dormancy and day-to-day disuse." *Id.*[10]

Perhaps the most celebrated instance of an early pretrial hearing in this country occurred in 1807 when the United States sought to prosecute Aaron Burr for treason. *See United States v. Burr*, 25 F. Cas. 1 (C.C.D. Va. 1807) (No. 14,692). A judicial hearing was convened by Chief Justice Marshall, who also sat as the trial judge, to determine whether probable cause existed to charge Burr with treason. *Id.* at 12 (No. 14,692a). The court reporter gave the following account:

> At ten o'clock MARSHALL, Chief Justice, took his seat on the bench, in the court room, which was densely filled with citizens. . . . On the suggestion of counsel that it would be impossible to accommodate the spectators in the court room, the chief justice adjourned to the hall of the house of delegates.

Id. at 11. As the hearing progressed, counsel for both sides presented argument, and the accused gave testimony. The following day, the Chief Justice ruled that the prosecution's evidence merely showed probable cause that Burr was guilty of the lesser crime of "carrying on a military expedition against a nation with whom the United States were at peace." *Id.* at 15.

Undaunted, the prosecution returned two months later with additional evidence and once again moved the court to charge Burr with treason. *See United States v. Burr*, 25 F. Cas. 25 (C.C.D. Va. 1807) (No. 14,692b). Because a grand jury had

[10]Even the existence of a statutory mechanism authorizing closure was limited in this country to "a numerically small bloc of states which early adopted a unique provision of the Field Code." Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A. L. Rev. 397, 407 (1961) (citing Commissioners on Practice and Pleadings, New York Code of Criminal Procedure, 4th Rep. § 195 (1849)).

been empanelled to consider the first charge, however, defense counsel opposed holding a second probable cause hearing based on the newly discovered evidence. In his view,

> a public examination of the evidence the district attorney might see fit to bring forward against Col. Burr would have a tendency to increase the prejudice already existing in the public mind against him, and in spite of all precautions this testimony would reach the ears of the grand jury.

Id. at 26. It is plain from defense counsel's concerns that, under normal circumstances, the preliminary hearing would be open to the public. Recognizing "that the result of this motion may be publications unfavorable to the justice and to the right decision of the case," the Chief Justice nevertheless refused to deny the prosecution the right to another preliminary hearing. *Id.* at 27. He did not even consider closing the hearing to protect Burr from unfair prejudice.

The American evolution of pretrial proceedings from magisterial inquisitions shrouded in secrecy to public hearings presided over by a neutral, judicial officer was duplicated shortly thereafter in England as well. In fact, by the mid-nineteenth century, the public character of the English preliminary hearing became one of its most celebrated features.[11] This transformation of pretrial proceedings in Britain occurred through the combined impact of a series of legislative reforms. By 1839, a modern police force, independent from the control of the magistrates, was firmly established, and by 1848 the accused was afforded a privilege against self-incrimination and a

[11]In his description of English criminal procedure after 1650, Pollock explains:

> The secret inquisitorial proceeding has become open and judicial; there is no longer an examination of the prisoner, but a preliminary trial in court, the police-court, which in modern times is to many citizens the only visible and understood symbol of law and justice. The magistrate's office is more public than ever; the feeling that justice should be done in the light of day has been strong enough to reassert itself after a partial eclipse.

F. Pollock, The Expansion of the Common Law 31(1904).

full panoply of confrontational rights during the preliminary hearing.[12] And, although the magistrate, now a judicial officer, theoretically retained authority to exclude the public from the preliminary hearing, *see* 11 & 12 Vict., ch. 42, § 19, "any use of this power of exclusion" quickly became "uncommon," F. Maitland, Justice and Police 129 (1972). Thus, in England as well as in the United States, pretrial *judicial* proceedings have, since their origins, been characterized by a presumption of openness and free public access.

In this country, it cannot be disputed that, in the more than 170 years from the *Burr* case through this Court's decision in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the closure of pretrial proceedings in criminal cases was a virtually unheard of phenomenon, *see id.* at 432 n. 11 (Blackmun, J., concurring in part) ("only the New York courts in this case, and perhaps some isolated others, have departed from this tradition [of open judicial proceedings] in criminal cases"); *In re Oliver*, 333 U.S. 257, 272 n.29 (1948) (no court has excluded press and public from criminal proceedings). Indeed, the "near uniform practice in the federal and state court systems has been to conduct pretrial criminal proceedings in open court." *State v. Williams*, 93 N.J. 39, 55, 459 A.2d 641, 649 (1983).[13] According-

[12]In 1829, the Metropolitan Police Act of Peel was enacted, and first differentiated the functions of magistrate and policeman. *See* 10 Geo. 4, ch. 44 (1829). By 1839, all control over the police had been transferred from the magistrates to police commissioners. R. Moley, Our Criminal Courts 19 (1930). The Prisoners' Counsel Act, 6 & 7 Will. 4, ch. 114 (1836), permitted all accused persons to inspect depositions to be used against them. *See* 1 W. Holdsworth, *supra* note 4, at 297. Finally, the Indictable Offences Act, 11 & 12 Vict., ch. 42 (1848), precluded the magistrate from examining the accused, although the accused was permitted to make a statement. Moreover, the accused was granted the right to call witnesses and to cross-examine the prosecution's witnesses. *Id.; see* 1 J. Stephen, *supra* note 7, at 221.

[13]*See, e.g., Application of the Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982); *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971); *Arkansas Television Co. v. Tedder*, 281 Ark. 152, 662 S.W.2d 174 (1983); *Star J.*

ly, this Court should forthrightly declare that the tradition of openness that has always characterized judicial pretrial proceedings in the criminal justice process has earned "'the favorable judgment of experience,'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 605 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 589 (Brennan, J., concurring in judgment)), and has created a presumptive right of public access under the First Amendment.

C. Access To Judicial Proceedings By The Press And Public Promotes The Integrity Of The Criminal Justice Process And Our System Of Self-Government.

The criminal justice system in this country has overwhelmingly become a pretrial process. "Indeed, most criminal

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Publishing Corp. v. County Court, 197 Colo. 234, 591 P.2d 1028 (1979); *State v. Burak*, 38 Conn. Supp. 627, 431 A.2d 1246 (Super. 1981); *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982); *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982); *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982); *Gannett Pacific Corp. v. Richardson*, 59 Hawaii 224, 580 P.2d 49 (1978); *State v. Porter Superior Court*, 274 Ind. 408, 412 N.E.2d 748 (1980); *Ashland Publishing Co. v. Asbury*, 612 S.W.2d 749 (Ky. App. 1980); *Buzbee v. Journal Newspapers, Inc.*, 297 Md. 68, 465 A.2d 426 (1983); *Minneapolis Star & Tribune Co. v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983); *State ex rel. Smith v. District Court*, 654 P.2d 982 (Mont. 1982); *Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 406 A.2d 137 (1979); *State v. Williams*, 93 N.J. 39, 459 A.2d 641 (1983); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, *cert. denied*, 449 U.S. 992 (1980); *Rapid City J. Co. v. Circuit Court*, 283 N.W.2d 563 (S.D. 1979); *Kearns-Tribune Corp. v. Lewis*, 685 P.2d 515 (Utah 1984); *Herald Ass'n v. Ellison*, 138 Vt. 529, 419 A.2d 323 (1980); *Richmond Newspapers, Inc. v. Virginia*, 222 Va. 574, 281 S.E.2d 915 (1981); *Federated Publications, Inc. v. Kurtz*, 94 Wash. 2d 51, 615 P.2d 440 (1980); *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544 (W. Va. 1980); *Williams v. Stafford*, 589 P.2d 322 (Wyo. 1979); Cal. Penal Code § 868 (West 1982); Mich. Stat. Ann. § 27A.1420 (Callaghan 1980); Wis. Stat. Ann. § 757.14 (West 1981); *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519 (1980); American Bar Ass'n, Standards Relating to the Administration of Justice, Fair Trial and Free Press, Standard 8-3.2 (2d ed. 1980).

prosecutions consist solely of pretrial procedures." *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 397 (1979) (Burger, C.J., concurring)). As judicial resources have become increasingly burdened and a panoply of procedural safeguards has been afforded criminal defendants, courts and counsel necessarily have become reliant on pretrial judicial proceedings for the fair and efficient dispensation of criminal justice. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 122 n.23 (1975); *State v. Williams*, 93 N.J. 39, 53-54, 459 A.2d 641, 648 (1983); C. Whitebread, Criminal Procedure § 21.01 (1980).

At least eighty-five percent— and perhaps as many as ninety-five percent— of all criminal cases are disposed of before trial. *Gannett Co. v. DePasquale*, 443 U.S. at 397 (Burger, C.J., concurring); C. Whitebread, *supra*, § 21.01; 1 W. LaFave & J. Israel, Criminal Procedure § 1.4 (1984); U.S. Department of Justice, The Prosecution of Felony Arrests, 1980, at 25 (1985). In many of these cases, "the pretrial hearing is the only adversary proceeding the accused will have in resolving his case." *United States v. Criden*, 675 F.2d at 557. Such proceedings may take many forms, among them suppression, preliminary, bail, due process, entrapment, competency and pretrial detention hearings. *See* Note, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 Emory L. J. 619 (1983).

This Court has recognized that pretrial hearings "often are as important as the trial itself." *Waller v. Georgia*, 104 S.Ct. 2210, 2215 (1984).[14] In *Coleman v. Alabama*, 399 U.S. 1, 8 (1970), for example, the Court asserted that a preliminary hearing held "to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury" may well prevent a defendant from being prosecuted at all. Even if a pretrial hearing is not determinative of the ultimate result of a criminal prosecution, the outcome of the hear-

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[14] In *Waller*, the Court noted that "in many cases, the suppression hearing was the *only* trial because the defendants thereafter pleaded guilty pursuant to a plea bargain." 104 S.Ct. at 2216.

ing still may have great significance to both the accused and the public generally. *See, e.g., Gerstein v. Pugh*, 420 U.S. at 114.

In view of the substantial role played by pretrial judicial proceedings in the criminal justice system, it follows that "[t]he principles that support a right of access to trials apply with equal force to pretrial proceedings." *United States v. Edwards*, 430 A.2d 1321, 1344 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). The distinction between trials and other proceedings "is not necessarily dispositive, or even important, in evaluating the First Amendment issues." *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring).[15] In short, "[p]ublic access to judicial proceedings serves an amalgam of functions, functions which are as applicable to critical pretrial hearings as to trials." *United States v. Edwards*, 430 A.2d 1321, 1344 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).[16]

1. Open judicial proceedings provide a fundamental safeguard for the fair conduct of the criminal justice system.

Public scrutiny is an essential safeguard of the fairness and quality of the criminal justice process. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606. Public access to judicial proceedings in criminal cases discourages misconduct by police, prosecutors and judges, "encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 104 S. Ct. at 2215. As this Court has declared, "'[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (Burger, C.J., announcing judgment) (quoting J. Bentham, Rationale of Judicial Evidence 524 (1827)).

Indeed, public scrutiny of judicial decisionmaking and law enforcement activities may nowhere be more crucial than at a preliminary hearing where an initial judicial determination is made either to subject the accused to the ordeal of a trial or to set him free, *see, e.g., Coleman v. Alabama*, 399 U.S. 1, 8 (1970); at an entrapment, due process or suppression hearing, where the propriety of the government's conduct is typically at issue, *see, e.g., Waller v. Georgia*, 104 S.Ct. 2210 (1984); or at a bail or pretrial detention hearing, which may result in the prolonged imprisonment of the accused, *see, e.g., United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). These proceedings, if incompetently or corruptly conducted, can be as destructive of the rights of the accused and the public as the trial itself.

Moreover, pretrial judicial proceedings are conducted without the benefit of a jury, long recognized as "'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'" *Williams v. Florida*, 399 U.S. 78, 100 (1970) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)). Thus, absent public access to pretrial criminal proceedings, many consequential decisions and actions of the courts and their officers "may go unscrutinized." *United States v. Criden*, 675 F.2d at 557.

Pretrial proceedings, such as preliminary and suppression hearings, commonly involve live testimony and cross-examination. *See* Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 866-69, 884, 963-72 (5th ed. 1980). Indeed, this Court has expressly noted the importance of the preliminary hearing in preserving testimony, impeaching witnesses, and

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[15]While a history of openness may alone compel a right of access to judicial proceedings, it is not a prerequisite, for the right of access is based only partly on the historical openness of the criminal courts. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), for example, this Court applied the First Amendment right of access to a trial involving the alleged rape of two teenaged girls, despite "a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors," *id.* at 614 (Burger, C.J., dissenting). The Court held that "[w]hether the First Amendment right of access to criminal trials can be restricted in the context of any particular trial . . . depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction." *Id.* at 605 n.13.

[16]In *Waller v. Georgia*, 104 S.Ct. 2210, 2215 (1984), the Court recognized that those same structural values that undergird its decisions recognizing a First Amendment right of access to trial proceedings "are no less pressing in a hearing to suppress wrongfully seized evidence."

enabling the defendant to discover important witnesses. *See Coleman v. Alabama*, 399 U.S. at 9. Hence, the salutary effects of publicity in "encourag[ing] witnesses to come forward and discourag[ing] perjury" are as important at these stages of the criminal process as at the trial. *See Waller v. Georgia*, 104 S.Ct. at 2215.[17]

Information gained by the public at even the most "routine" judicial proceedings has served to root out official misconduct beyond the bounds of the criminal justice process itself. The Watergate scandal might well have escaped detection if the original bail hearing of the Watergate burglars had not been open to the press and public. Following the June 17, 1972 break-in at the headquarters of the Democratic National Committee, *Washington Post* reporter Bob Woodward attended a presumably perfunctory bail hearing. At that hearing, Woodward learned the names of the burglary suspects, that one of the suspects was a "security consultant" and a retired CIA employee, that the burglary may have been politically motivated, and that, curiously, the suspects were represented by retained counsel. *See* C. Bernstein & R. Woodward, All The President's Men 16-18 (1974). The first news report concerning the Watergate burglary appeared the following day in *The Washington Post*, *see* Wash. Post, June 18, 1972, at A1, col. 1, which undertook an investigation that eventually would help uncover "an unprecedented scandal at the highest levels of government," *United States v. Haldeman*, 559 F.2d 31, 51 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977).

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[17]To ensure the fair and impartial administration of justice, there is also an "imperative need for total and absolute independence of judges . . . in any phase of the decisional function." *Chandler v. Judicial Council*, 398 U.S. 74, 84 (1970). Public scrutiny of the pretrial adjudicatory process helps ensure that the judicial branch is not subject to undue influence from officials of the other departments of government, that judicial decisionmakers remain "neutral and detached," *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975), and that a judge's decisions are not "based on secret bias or partiality," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (Burger, C.J., announcing judgment).

2. Open judicial proceedings in criminal cases facilitate the free discussion of public affairs.

Underlying the First Amendment right of access to judicial proceedings in criminal cases "is the common understanding that 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Specifically, "[o]ne of the demands of a democratic society is that the public should know what goes on in the courts by being told by the press what happens there." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 573 n.9 (Burger, C.J., announcing judgment). Thus, the right of access to judicial proceedings "ensure[s] that [the] constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 605.

In our system of government, an independent judiciary is entrusted with responsibility for bringing "offenders . . . to account for their criminal conduct." *Press-Enterprise I*, 464 U.S. at 509, holding "the balance nice, clear and true between the state and the accused," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), and defending individual liberties against official abuses, *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), responsibilities not always shared by the other participants in the criminal justice system. For the public to be fully informed about the system's performance of these vital functions, it must be able to view the entire judicial process, a process that is now typically completed before trial. Indeed, issues of prosecutorial misconduct, exclusions of confessions and illegally obtained evidence, or the incompetence of the accused to stand trial, all usually disposed of in pretrial hearings, are of greater significance to the free discussion of public affairs in many cases than the guilt or innocence of the accused. *See Journal Newspapers, Inc. v. State*, 54 Md. App. 98, 109, 456 A.2d 963, 969 (1983).

A variety of significant issues of public policy may be raised in pretrial criminal proceedings. In Los Angeles, for example, a preliminary hearing lasting more than nineteen months has

led to a nationwide examination of the problem of child abuse.[18] The hearing has involved the alleged sexual abuse of scores of preschool children over a ten-year period at the McMartin Preschool in Manhattan Beach, California.[19] The so-called "*McMartin*" case has sparked a public debate concerning alleged inefficiency, unfairness, and delay in the preliminary hearing process,[20] as well as "the judicial system's ability to deal effectively and fairly with the emotionally charged issue of allegations of sexual abuse of children," *Reporter's Notebook: 6 Months of California Case*, New York Times, Feb. 13, 1985, § A, at 16, col. 2.[21] Prompted by the *McMartin* preliminary hearing, the California legislature passed controversial reform legislation allowing certain child victims of sexual abuse to testify by closed circuit television.[22] Testimony at the preliminary hearing also helped engender a nationwide examination of the quality of day care facilities[23] and resulted in the creation of model day care guidelines by the United States Department of Health and Human Services.[24] These ramifications of public access to the preliminary hearing in the *McMartin* case illustrate the necessary dependence of an informed discussion of public affairs on open judicial proceedings.

Ultimately, public access to pretrial judicial proceedings enhances "the appearance of fairness so essential to public

[18]*See, e.g., Child Molestation Case A Long Way From Trial; Preliminary Hearings Are 9 Months Old*, Wash. Post, May 10, 1985, § 1, at E1; *Boy's Responses At Sex Abuse Trial Underscore Legal Conflict*, N.Y. Times, Jan. 27, 1985, § 1, part 1, at 14, col. 1; *Reporter's Notebook: 6 Months of California Case*, N.Y. Times, Feb. 13, 1985, § A, at 16, col. 2.

[19]*See Child Abuse Case Marked by Delays*, N.Y. Times, Sept. 9, 1984, § B, at 21, col. 1.

[20]*See, e.g.*, N.Y. Times, Sept. 9, 1985, § B, at 21, col. 1; Wash. Post, May 10, 1985, § 1, at E1.

[21]*See also* N.Y. Times, Jan. 27, 1985, § 1, part 1, at 14, col. 1.

[22]*See* Wash. Post, May 10, 1985, § 1, at E1; N.Y. Times, Sept. 9, 1985, § B, at 21, col. 1.

[23]*See, e.g., Increased Demand For Day Care Prompts A Debate On Regulation*, N.Y. Times, Sept. 2, 1984, § 1, part 1, at 1, col. 1.

[24]*See, e.g., Boy Recants Testimony In Child Abuse Case*, N.Y. Times, Jan. 25, 1985, § A, at 10, col. 6.

confidence" in the criminal justice system, *Press-Enterprise I*, 464 U.S. at 508, and serves "an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 571 (Burger, C.J., announcing judgment). If a defendant is unexpectedly released following a closed hearing, such an event "can cause a reaction that the system at best has failed and at worst has been corrupted." *Id.* Conversely, since plea bargaining has become the predominant means of resolving criminal cases, *see* U.S. Department of Justice, The Prosecution of Felony Arrests, 1980, at 18 (1985), a pretrial hearing is typically the only occasion at which the community can satisfy its "urge to retaliate and desire to have justice done," *Press-Enterprise I*, 464 U.S. at 509. "[R]esults alone" cannot assuage "the natural community desire for 'satisfaction,'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 571 (Burger, C.J., announcing judgment), and open proceedings have proven to be the most effective mechanism for ensuring public awareness and acceptance.

II. JUDICIAL PROCEEDINGS IN CRIMINAL CASES CANNOT BE CLOSED TO THE PRESS AND PUBLIC UNLESS:

A. OPEN PROCEEDINGS WOULD CREATE A CLEAR AND PRESENT DANGER TO THE FAIRNESS OF THE TRIAL;

B. NO LESS RESTRICTIVE ALTERNATIVES TO CLOSURE ARE AVAILABLE; AND

C. CLOSURE WILL EFFECTIVELY PROTECT AGAINST THE PERCEIVED HARM.

Because of the constitutional presumption against barring the press and public from judicial proceedings in criminal cases, the justification for closure "must be a weighty one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 606. The need for closure must be demonstrably "compelling" and any measures to accommodate that need must be "narrowly tailored." *Id.* at 607. To ensure protection of precious First Amendment rights, it is crucial that appellate courts "impress

upon trial courts the need for meticulous and conscientious decision-making in evaluating motions for closure." *State v. Williams*, 93 N.J. 39, 70 n.17, 459 A.2d 641, 657 n.17 (1983). Thus, a number of courts have adopted the standards proposed by the American Bar Association for determining when "closure is essential to preserve higher values." *Press-Enterprise I*, 464 U.S. at 510.[25] Under the ABA test, a court may close a pretrial proceeding and seal the record only if the party seeking closure can meet the burden of proving: (A) "the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial," and (B) "the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means."[26]

In addition, an infringement of First Amendment liberties can never be tolerated if it will realistically be unable to accomplish its intended purpose. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 565-67 (1976); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979); *id* at 110 & n.3 (Rehnquist, J., concurring). Finally, the trial court must articulate the reasons for closure on the record in "findings specific enough that a reviewing court can determine whether the

[25]*See, e.g., In re P.R. v. District Court*, 637 P.2d 346, 352-53 (Colo. 1981) (en banc); *Kansas City Star Co. v. Fossey*, 230 Kan. 240, 247-50, 630 P.2d 1176, 1181-84 (1981); *State ex rel. Smith v. District Court*, 654 P.2d 982, 987 (Mont. 1982).

[26]American Bar Ass'n, Standards Relating to the Administration of Justice, Fair Trial and Free Press, Standard 8-3.2 (2d ed. 1980). *See United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982). The Ninth Circuit in *Brooklier* articulated a test permitting closure only when a court makes findings, articulated in the record, that (A) there is a substantial probability that a compelling interest will suffer irreparable harm absent closure; (B) no adequate alternatives to closure are available; and (C) closure will effectively protect against the perceived harm. *Id.* at 1167 (quoting *Gannett Co. v. DePasquale*, 443 U.S. at 440-42 (Blackmun, J., concurring in part)). *See also* 28 C.F.R. § 50.9 (1985) (requiring United States attorneys to oppose closure of any federal trial, pre- or post-trial evidentiary hearing, or plea or sentencing proceeding, with specified exceptions, except in those "very few cases" where "closure is plainly essential to the interests of justice").

closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.[27]

A. Pretrial Publicity Will Rarely, If Ever, Prevent A Fair Trial.

This Court has squarely held that "pretrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial." *Nebraska Press Association v. Stuart*, 427 U.S. at 554. Jurors need not begin the trial unaware of news reports regarding the crime with which the defendant is charged, even though those reports contain material inadmissible at trial. *See*

[27]Although the California Supreme Court did not discuss in its opinion below whether the record in this case contains sufficient evidence to meet its test of "reasonable likelihood of prejudice" to the defendant's fair trial right, the court of appeal concluded that the test was met in this instance by the mere existence of extensive, although factual, news coverage of the alleged crime over a two-year period. *See Press-Enterprise Co. v. Superior Court*, 150 Cal. App. 3d 888, 198 Cal. Rptr. 241, 248-149 (1984). This standard utterly "ignore[s] the real difference in the potential for prejudice" between largely factual publicity and "that which is invidious or inflammatory." *Murphy v. Florida*, 421 U.S. 794, 800 n.4 (1975). For all practical purposes, the California courts' standard at best creates a presumption of closure of pretrial proceedings in any publicized criminal case; at worst, it is a requirement of closure under such circumstances. For, as this Court has noted, to demand that jurors in such cases be "totally ignorant of the facts" of the case to be tried at the time they are sworn "'would be to establish an impossible standard.'" *Id.* at 800 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

In addition, the California Supreme Court asserted that, because "[t]he problem of potential prejudice to the defendant is substantially different in relation to public trials than it is in relation to public preliminary hearings," *Press-Enterprise Co. v. Superior Court*, 37 Cal. 3d 772, 776, 691 P.2d 1026, 1028, 209 Cal. Rptr. 360, 362 (1984), the First Amendment is inapplicable to preliminary hearings. Assuming *arguendo* that news coverage of preliminary hearings produces a greater risk of prejudice than does trial publicity, even a compelling governmental interest "does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary . . . ." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608. The concerns of the California Supreme Court can be adequately "addressed by balancing the need for closure against the right of access, not by refusing to recognize such a right." *United States v. Edwards*, 430 A.2d 1321, 1344 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

Murphy v. Florida, 421 U.S. 794, 799 (1975). As this Court has stated, even if pretrial publicity would likely create in the minds of all prospective jurors a "preconceived notion as to the guilt or innocence of an accused," that fact, "without more," is insufficient to demonstrate a violation of the accused's right to a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*

Empirical research reinforces this Court's traditional skepticism concerning the prejudicial impact of pretrial publicity. These studies "indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence." R. Simon, The Jury: Its Role in American Society 117 (1980). *Accord* J. Buddenbaum, D. Weaver, R. Holsinger & C. Brown, Pretrial Publicity and Juries: A Review of Research 2 (1981) [hereinafter cited as J. Buddenbaum]. For example, an experiment at the University of Minnesota identified no difference in the verdict patterns of jurors exposed to prejudicial news stories before a mock trial and jurors who were not so exposed. *See* Kline & Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, Journalism Q., Spring 1966, at 113-16. Another study utilizing subjects drawn from local voter registration lists found that, to the extent jurors are influenced by sensational news stories before the trial, the trial process virtually eliminates any influence of the stories and leads to a verdict based solely on the trial evidence. *See* Simon, *Murder, Juries, and the Press*, Trans-Action, May-June 1966, at 40. "The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning, and greater detachment." R. Simon, *supra*, at 117. Other studies have produced similar findings.[28]

[28] *See, e.g., The Men at the Bar Meeting Debate Gannett v. DePasquale*, The Quill, March 1980, at 8; W. Grady, Prejudicial Pretrial Publicity: Its Effects on Juries and Jurors (1972) (unpublished thesis, Northwestern University); Simon & Eimermann, *The Jury Finds Not Guilty: Another Look at Media Influence on the Jury*, Journalism Q., Summer 1971, at 343; S. Riley, The Free Press-Fair Trial Controversy: A Discussion of the Issues and an Examination of Pretrial Publicity by Survey Research (1970) (unpublished Ph.D. dissertation, University of North Carolina); Kaplan, *Of Babies and Bathwater*, 29 Stan. L. Rev. 621 (1977); Wilcox, *The Press, the Jury, and the Behavioral Sciences*, Journalism Monographs, Oct. 1968, at 20.

Moreover, research indicates that prospective jurors exposed to pretrial media coverage of a criminal case are less likely to prejudge the case than those who learned about it from other second-hand accounts. *See* Riley, *Pretrial Publicity: A Field Study*, Journalism Q., Spring 1973, at 17.

Such findings are emphatically confirmed by actual experience. Despite substantial adverse pretrial publicity, the trials of such notable criminal defendants as John DeLorean, John Hinkley, Claus Von Bulow, Dan White, Maurice Stans, John Connally and Angela Davis all ended in verdicts of acquittal. "These verdicts may be the most reliable and powerful data we have about jurors' ability to withstand pretrial publicity." R. Simon, *supra*, 117-18.

In the *DeLorean* case, for example, a poll taken before the trial, and before a major television network aired a highly incriminating videotape, indicated that ninety-two percent of those living in the trial locale were familiar with the case and seventy percent believed the defendant was guilty. *See* Brill, *Inside the DeLorean Jury Room*, Am. Law., Dec. 1984, at 1. Yet, following a four-month trial, the jury returned a verdict of not guilty. *Id.* Similarly, a survey of twenty trials in the Chicago area that were preceded by "massive pretrial publicity" found that in all twenty cases, the defendants were acquitted. *See The Men at the Bar Meeting Debate Gannett v. DePasquale*, The Quill, March 1980, at 8.

Even when publicity from a sensational case arguably saturates a community, many potential jurors usually are not even aware of the existence of press coverage. *See CBS, Inc. v. United States District Court*, 729 F.2d 1174, 1179 (9th Cir. 1983). In one of the recent "Abscam" prosecutions of congressmen and other public officials on charges arising from an elaborate F.B.I. undercover "sting" operation, for example, the Second Circuit concluded that, despite extensive media coverage, "only about one-half of the prospective jurors indicated that they had ever heard of Abscam . . . [and] only eight or ten [of those] had anything more than a most generalized kind of recollection what it was all about." *Application of National Broadcasting Co.*, 635 F.2d 945, 948 (2d Cir 1980).

Accord United States v. Mitchell, 551 F.2d 1252, 1262 n.46 (D.C. Cir. 1976), *rev'd on other grounds*, 435 U.S. 589 (1978) ("it would be possible to empanel a jury whose members had never even heard the [Watergate] tapes").

Only on rare occasions are convictions so tainted by prejudicial publicity that they must be reversed. *Nebraska Press Association v. Stuart*, 427 U.S. at 554; *see United States v. Haldeman*, 559 F.2d 31, 60-61 & n.32 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977). Indeed, a study of 63,000 appeals of criminal convictions in all fifty states over a five-year period found that in only twenty-one cases did the states' highest appellate courts overturn convictions based all or in part on prejudicial publicity. *See* Spencer, *Coverage Seldom Cause for Conviction Reversal*, Presstime, Oct. 1982, at 16. In only 368 cases did defense attorneys even raise the issue of prejudicial publicity. *Id.* Notably, only once has this Court reversed a conviction because it found that pretrial publicity, standing alone, made a fair adjudication impossible. *See Rideau v. Louisiana*, 373 U.S. 723 (1963).[29] Thus, both empirical research and practical experience teach that pretrial publicity rarely, if ever, poses a serious threat to a criminal defendant's right to a fair trial.

[29]In *Rideau*, film of a police interrogation of the defendant, in which he confessed to murder, kidnapping, and robbery, was broadcast on three consecutive days by local television stations. Because the Court concluded that "this spectacle . . . in a very real sense *was* Rideau's trial," it held that the accused's actual trial became "but a hollow formality." 373 U.S. at 726. Even in this extreme case, Justices Harlan and Clark dissented on the ground that the defendant's right to a fair trial had not been violated, *id.* at 727-33, and the majority noted that a change of venue would have adequately protected that right, *id.* at 727. All other cases in which this Court has invalidated convictions because of violations of defendants' fair trial rights have turned on factors other than the presence of pretrial publicity. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966).

On other occasions, this Court has found trials to be fair despite jurors' admitted predisposition against the accused. *See, e.g., Murphy v. Florida*, 421 U.S. 794 (1975) (no due process violation despite jurors' knowledge of defendant's criminal record and admissions by several jurors that such knowledge probably would influence the verdict); *Beck v. Washington*, 369 U.S. 541, 579-88 (1962) (Douglas , J., dissenting) (due process claim rejected by Court despite unprecedented pretrial publicity which "thoroughly discredited" defendant, and failure of trial judge to admonish jurors regarding publicity and bias); *Stroble v. California*, 343 U.S. 181, 199-202 (1952) (Frankfurter, J., dissenting) (due process claim rejected despite "notorious widespread public excitement" and sensational news coverage of defendant's alleged sex crime).

In the instant case, the courts below dismissed objections to the language of the closure standard invoked by a trial judge as squabbles over semantics. *See, e.g., Press-Enterprise Co. v Superior Court*, 37 Cal. 3d 772, 781, 691 P.2d 1026, 1032, 209 Cal. Rptr. 360, 366 (1984). Given the demonstrated improbability that pretrial publicity will even place a criminal defendant's right to a fair trial in jeopardy, however, the substantive standard applied by the trial judge assumes crucial importance. Unless trial courts understand that closure is only appropriate on those rare occasions when the defendant's constitutional rights are *in fact* endangered, they will continue to subordinate the public's acknowledged First Amendment right of access to the remote possibility that another constitutional right may otherwise be infringed. In short, as the ABA has recognized by adopting a "clear and present danger" standard, the test for closure must have "teeth" so that trial judges will apply it diligently to the facts of concrete cases with an informed appreciation of its purpose.

B. Closure Is Justified Only If No Less Restrictive Alternatives Are Available.

"In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats" to the rights of the accused. *Nebraska Press Association v. Stuart*, 427 U.S. at 551. Consequently, in order to justify closure of any portion of a pretrial proceeding, the court must first consider and reject alternatives to closure that are less restrictive of the exercise of First Amendment rights. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 580-81 (Burger, C.J., announcing judgment); *Press-Enterprise I*, 464 U.S. at 511. These alternatives include "searching questioning of prospective jurors" during *voir dire* "to screen out those with fixed opinions as to guilt or innocence," *Nebraska Press Association v. Stuart*, 427 U.S. at 564; "emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court," *id.*; change of trial venue to a locale less exposed to

pretrial publicity, *id.* at 563; "postponement of the trial to allow public attention to subside," *id.* at 563-64; and sequestration of jurors, *id.* at 564. Moreover, the trial court retains wide latitude to craft other alternatives to closure in order to minimize the effect of pretrial publicity. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

Foremost among the alternatives to closure is *voir dire*. Courts regularly rely upon carefully conducted *voir dire* as the most effective means to "screen out" individuals who may have been prejudiced by pretrial news reports. *See, e.g., Patton v. Yount*, 104 S. Ct. 2885 (1984); *Murphy v. Florida*, 421 U.S. 794, 800-04 (1975). Research data demonstrate that "the effects of any pretrial publicity can be decreased, if not completely removed" by such "careful *voir dire* examination." J. Buddenbaum, *supra*, at 11; *see* Padawer-Singer, Singer & Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, Judicature, April 1974, at 386.

Empirical studies also provide evidence of how careful instructions and admonitions can be effective in ensuring that jurors give weight only to the evidence before them. *See, e.g.*, Simon, *Murder, Juries, and the Press*, Trans-Action, May-June 1966, at 40. The presumption that jurors will follow proper and adequately explained instructions is a cornerstone of the criminal judicial system. *See Nebraska Press Association v. Stuart*, 427 U.S. at 564.

This Court has recognized that the passage of time alone substantially dilutes any effect of adverse news coverage. *See Patton v. Yount*, 104 S. Ct. at 2889-90; *Stroble v. California*, 343 U.S. 181, 191-94 (1952). Sequestration, of course, can be employed only after the jury has been selected. Nevertheless, some courts have opted for sequestration by postponing pretrial proceedings until the jury has been sworn. *See, e.g., Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, *cert. denied*, 449 U.S. 992 (1980). This approach eliminates any possibility of prejudice to the accused without infringing the public's First Amendment rights. Even if the jury is not sequestered during pretrial proceedings, sequestration still "enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths." *Nebraska Press Association v. Stuart*, 427 U.S. at 564. Finally, this Court has encouraged a change of venue where pretrial publicity is likely to prevent the empanelling of an impartial jury. *See, e.g., Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

In the instant case, the trial court did not consider any alternatives to closure of a forty-one day preliminary hearing. This fact alone warrants invalidation of the closure order. *See Press-Enterprise I*, 464 U.S. at 511. *Post hoc* assertions by the California Court of Appeal that the trial court somehow balanced the public's right to an open hearing against the defendant's fair trial right "cannot satisfy the deficiencies in the trial court's record." *Waller v. Georgia*, 104 S.Ct. at 2217 n. 8. In any event, neither appellate court below examined the record for itself to determine whether probing *voir dire* or careful jury instructions would adequately protect the defendant's rights. Moreover, neither appellate court even considered a continuance, change of venue or sequestration to be legitimate alternatives to closure, despite the fact that this Court has repeatedly invoked precisely these mechanisms as judicial responses preferable to the infringement of First Amendment rights, *see Nebraska Press Association v. Stuart*, 427 U.S. at 564, that adequately safeguard the fairness of a criminal prosecution, *see Rideau v. Louisiana*, 373 U.S. at 727; *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

C. A Closure Order Must Effectively Protect Against The Perceived Harm.

Before closing any portion of a judicial proceeding in a criminal case, a trial court must also demonstrate that closure will effectively vindicate the defendant's right to a fair trial. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. at 608-10; *United States v. Brooklier*, 685 F.2d at 1169. This principle demands that closure of judicial proceedings be denied unless there is a substantial probability that closure will be effective in protecting against the perceived harm. *Id.*

Thus, before closing a proceeding, the trial court must determine that the information sought to be withheld from public exposure by closure will not be made public anyway. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 609-10; *Gannett Co. v. DePasquale*, 443 U.S. at 442 (Blackmun, J., concurring in part). Closing a court proceeding does not restrict the press from gathering news from alternative sources or from publishing information intentionally or inadvertently leaked from a closed proceeding. *Id.* Moreover, when "there has already been a substantial amount of pre-trial publicity," a court simply "cannot unscramble the scrambled egg." *People v. Harris*, 6 Media L. Rep. (BNA) 1399, 1400 (Mich. Cir. May 30, 1980). Closure most certainly cannot stifle the spread of rumors, which may even be spawned by the suggestion of suppression that pervades a secret proceeding, *see In re Mack*, 386 Pa. 251, 277, 126 A.2d 679, 691-92 (1956), *cert. denied*, 352 U.S. 1002 (1957) (Musmanno, J., dissenting), and might be "more damaging than reasonably accurate news accounts," *Nebraska Press Association v. Stuart*, 427 U.S. at 567.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

DESCRIPTION OF AMICI

The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of about 1,400 newspapers constituting over ninety percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 24,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business is conducted in public and to keep governmental proceedings, including court hearings, open to the public.

American Broadcasting Companies, Inc. is a New York corporation which owns and operates a national television network (ABC), national radio networks, television and radio broadcasting stations, and, through various subsidiaries, also publishes magazines and books.

The American Society of Newspaper Editors (ASNE) is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and "the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people."

CBS Inc. is engaged, through its news division, in the nationwide dissemination of news, operates national television and radio networks, and owns and operates television and radio stations.

Chicago Tribune Company, a wholly-owned subsidiary of the Tribune Company, publishes the *Chicago Tribune*, the newspaper with the largest circulation in Illinois.

Chronicle Publishing Co. publishes *The San Francisco Chronicle*, a daily newspaper in San Francisco, California with a daily circulation of 535,562 and a Sunday circulation of 669,591. The Chronicle Broadcasting Co., a wholly-owned subsidiary of Chronicle Publishing Co., operates three television stations.

The Concord Monitor is a newspaper serving New Hampshire's capital city.

Dow Jones & Co., Inc. publishes, *inter alia*, The Wall Street Journal, Barron's National Business and Financial Weekly, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and twenty-two community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

Gannett Co., Inc. publishes USA TODAY and 85 other daily newspapers, 38 non-daily newspapers, and USA WEEKEND; it operates six television stations and fourteen radio stations. These Gannett subsidiaries operate newsrooms in 38 states, in Guam, The Virgin Islands, and the District of Columbia.

Globe Newspaper Company publishes *The Boston Globe*, a daily newspaper in Boston, Massachusetts.

The Hearst Corporation is a diversified privately-held company which is engaged in a broad spectrum of commercial activities including communications. It publishes nationally distributed magazines, newspapers and hard-cover and soft-cover books, and it owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

The Miami Herald Publishing Co., a division of Knight-Ridder Newspapers, Inc., publishes *The Miami Herald*, which has a daily circulation of 422,275.

The Minneapolis Star and Tribune Company, a division of Cowles Media Company, a Delaware corporation, publishes *The Minneapolis Star and Tribune*, a seven-days-a-week newspaper which circulates throughout the State of Minnesota.

The National Association of Broadcasters (NAB), organized in 1922, is a non-profit incorporated association of radio and television broadcast stations and networks. NAB membership includes more than 4500 radio stations, 850 television stations and the major commercial broadcast networks.

The National Newspaper Association is a trade association consisting of more than 5,000 weekly and daily newspapers located throughout the United States. Since 1885, a major purpose of the Association has been to preserve the constitutional guarantee of freedom of the press.

National Public Radio (NPR), an organization with over 300 member stations, produces the news programs "Morning Edition" and "All Things Considered." These programs cover legal issues and criminal proceedings in depth. Access to court proceedings is an essential tool for the reporters of NPR and its member stations.

The Philadelphia Inquirer is a daily and Sunday newspaper published in Philadelphia, Pennsylvania, and distributed in Pennsylvania, New Jersey and Delaware by Philadelphia Newspapers, Inc., which is a subsidiary of Knight-Ridder Newspapers, Inc.

Phoenix Newspapers, Inc. publishes *The Arizona Republic* and *The Phoenix Gazette*, with a combined daily circulation of 408,763, and *The Arizona Business Gazette*, a weekly newspaper in Phoenix, Arizona.

The Public Broadcasting Service (PBS) is a non-profit, membership corporation, the members of which are licensees of non-commercial, educational television stations. PBS's members produce a significant body of news, public affairs, and documentary programming both for their own local broadcast and for national distribution by PBS. PBS has a vital interest in

assuring its members access to important pretrial proceedings.

The Radio-Television News Directors Association (RTNDA) is a professional organization of more than 2000 news directors and others who are active in the supervising, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970. The Committee provided research assistance in the preparation of this brief.

Richmond Newspapers, Inc. publishes a morning newspaper, the *Richmond-Times Dispatch*, and an evening newspaper, *The Richmond News Leader* (combined circulation in excess of 250,000 and Sunday morning circulation 230,878), which are distributed in twenty-one cities and seventy-one counties throughout the Commonwealth of Virginia.

Scripps Howard, one of the nation's largest communications companies, is engaged in virtually every aspect of news and information gathering and dissemination. One American in nine is a Scripps Howard reader, viewer, or listener. Scripps Howard publishes daily newspapers in fourteen cities as well as a variety of non-daily newspapers, magazines, and business journals, and owns and operates radio and television stations, cable systems, Scripps Howard News Service, and United Media Enterprises, a multi-media service company.

Seattle Times Company is a Delaware corporation with its principal place of business in Seattle, Washington, where it publishes *The Seattle Times*, a daily newspaper.

The Washington Post, a division of the Washington Post Co., publishes a daily newspaper of general circulation in the Washington, D.C. area (circulation approximately 800,000 weekdays, 1,050,000 Sundays), and maintains a substantial newsgathering organization.

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